Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

GEORGE T. KELLY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389 (2002), the Court held that sections (8)(B) and (8)(D) of the 1996 Child Pornography Protection Act (18 U.S.C. § 2256) were overbroad and unconstitutional. The question presented in this petition is whether the 1996 Child Pornography Protection Act should be declared unconstitutional by virtue of it being overbroad and vague, thus violative of the First Amendment or the Court's Fifth Amendment-void-for-vagueness cases?

2. Whether petitioner's guilty plea should be vacated (via plain error) where count three of the information to which he pled guilty, post-*Ashcroft*, charged "child pornography" without differentiating between the potentially valid and invalid sections of 18 U.S.C, § 2256 declared unconstitutional pursuant to *Ashcroft*?

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PETITION FOR WRIT OF CERTIORARI

To: The Chief Justice and Associate Justices of the United States Supreme Court. May it please the court:

George T. Kelly (hereafter petitioner), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The published opinion and judgment of the court of appeals was filed on January 3, 2003, and is reported at 314 F.3d 908. Pet. App., *infra*, 1a-10a. The petitioner did not seek rehearing.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTION AND STATUTES

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."

The Fifth Amendment to the United States Constitution provides [that] "No person shall . . . be deprived of life, liberty, or property, without due process of the law."

18 U.S.C. § 2252A(a)(5)(B) states [that]: Any person who—either—knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in inter-

state or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, shall be punished as provided in subsection (b) (18 U.S.C. § 2252A is reproduced in its entirety at App. 11a-14a).

STATEMENT

1. Prior to January 2002 petitioner, age 63, had retired after approximately thirty years of service as a supervising engineer with the Metropolitan Water Reclamation District of Greater Chicago. He also held Illinois architect and landscape architect licenses. At all times herein pertinent, petitioner lived with his spouse and family in a western suburb of Chicago.

2. On January 28, 2002, via information 02 CR 118, petitioner was charged in the United States District Court in Chicago with offenses relating to the Child Prevention Pornography Act, 18 U.S.C. § 2252A (CPPA). As relevant to this petition, count three charged petitioner with violating 18 U.S.C. § 2252(a)(5)(B). Reproduced at App. 15a.

On February 14, 2002, petitioner, with counsel, appeared before the district court, waived indictment and entered a plea of guilty to counts three and twelve of information 02 CR 118 (R. 6-7). The statutory underpinning for count three was 18 U.S.C. §§ 2252A(a)(5)(B) (relevant segments of §§ 2252A reproduced at App. 11a-13a).

3. On April 16, 2002, the Court decided *Ashcroft v. The Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389. When petitioner appeared for sentencing on April 19, 2002, pursuant to *Ashcroft*, the government was granted leave to dismiss count twelve (R. 10). Petitioner's counsel ad-

vanced arguments supporting the proposition that *Ashcroft* mandated the dismissal of count three. In pertinent part, counsel argued:

> Our objection is, the Supreme Court has said that what he sent to the other gentleman is lawful and constitutional and cannot be prescribed by Congress in the opinion that was written by the Supreme Court. You can't punish him for lawful conduct.

Id. at Tr. 9. After further colloquy with the district court, petitioner's counsel continued to maintain that *Ashcroft* impacted on count three as follows:

> MR. KOMIE [defense counsel]: Judge, the other problem we have here is that everything that was done here, including the guidelines, was done on the assumption that the law was valid when the Sentencing Commission formulated them in 1996. The statute that he has plead guilty to was a 1996 enactment that the Supreme court has said is unconstitutional. There is no language in the Supreme Court opinion saving any other part of that enactment at this point. In other words, the Supreme Court points to other sections of the code that it says are valid.
>
> THE COURT: Well, your reading of the Supreme Court opinion is much different than mine. I thought the Supreme Court restricted its holding to the subject of virtual pornography as opposed to the use of live children to create pornography.
>
> MR. KOMIE: That may have been the portion they were talking about in terms of finding it unconstitutional, but they went on to say which were the valid laws in that same sections of the code, and it says on page seven of the opinion,

> "... Congress may pass valid enactments to protect children from abuse, and it has ..."
>
> and then it goes on to point out 18 USC 2241 and 2251, but there's nothing in this opinion that saves the statute.
>
> THE COURT: I beg to differ with you on that.

Id. at Tr. 11-12.

After the district court rejected petitioner's *Ashcroft* importunings (for count three dismissal) and following Federal Sentencing Guideline departure-related arguments (not at issue here), petitioner was sentenced to 33-months in federal custody (R. 12, 19). Petitioner self-surrendered to commence service of his sentence and prosecuted a direct appeal.

4. Petitioner advanced similar *Ashcroft*-related arguments on direct appeal and on January 3, 2003, the court of appeals held that 18 U.S.C. § 2252A(a)(5)(B) was not impacted by *Ashcroft* and affirmed petitioner's conviction (Pet. App., *infra*, 2a-8a).

Because the circuits are divided regarding *Ashcroft's* impact, *viz.*, the CPPA, petitioner seeks review and reversal.

REASONS FOR GRANTING THE PETITION

1. Background. The CPPA of 1996 represents a content-specific enactment which attempts to regulate speech based on the thoughts or ideas [it] conveys to the viewer. Hence it must be subjected to exacting constitutional scrutiny and such content-based regulations are presumptively invalid, *R.A.V. v. City of St. Paul, MN.*, 505 U.S. 377, 382, 112 S.Ct. 2538 (1992) (Content-based regulations are presumptively invalid) (parallel citations

omitted). While the First Amendment fails to include a freedom to disregard traditional limitations, obscenity falls within protected speech. *Id.* at 383-84 (citing *Sunstein, Pornography and the First Amendment,* 1986 Duke L.J. 589, 615, n. 146). In *R.A.V.*, Justice Scalia took issue with a segment of Justice White's concurring opinion, explaining:

> Although Justice WHITE asserts that our analysis disregards "established principles of First Amendment law," *post*, at 2560, he cites not a single case (and we are aware of none) that even involved, much less considered and resolved, the issue of content discrimination through regulation of "unprotected" speech—though we plainly *recognized* that as an issue in *New York v. Ferber,* 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982).

505 U.S. at 386, n. 5.

The CPPA significantly expanded that which has been considered "child pornography" by including within that definition sexually explicit depictions of nonchildren, including youthful-looking adults as well as non-existent characters or actors. Under the CPPA child pornography is defined as any sexually explicit material that: (1) depicts actual minors; (2) depicts persons who appear to be minors; (3) modifies or alters the image of an identifiable minor so that the minor appears to be engaging in sexually explicit conduct; or (4) is advertised or described so as to convey the impression that it depicts a minor. See 18 U.S.C. § 2256(8).[1] *United States Senate Report* No. 358

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[1] The CPPA expanded the definition of "child pornography" by including definitions by including sexually explicit depictions of nonchildren, youthful-looking adults and fictional characters. In addition, the 1996 Act amended §§ 2251, 2252, 2256 and added

(continued...)

incorporated repeated warnings from constitutional scholars that the CPPA would not pass constitutional muster (S.Rep. No. 358 at 29). For example, Professor Frederick Schauer, who had been appointed Commissioner of the Attorney General's Commission on Pornography, advised Congress that the CPPA would be unconstitutional. *Ibid.* Members of Congress also warned that the extreme expansion of child pornography legislation embraced by the CPPA would likewise fail under Supreme Court precedent. *Id.* at 37-38. Based on the concerns of constitutional scholars and members of Congress, the Senate added § 2256(8)(c) which arguably addressed concerns surrounding the definition of child pornography, S.Rep. 358 at 11, 31.

2. The antecedent CPPA challenge. In *Free Speech Coalition v. Reno*, 198 F.3d 1083 (9th Cir. 1999), a divided court held that segments of 18 U.S.C. § 2256A were vague and overbroad and did not meet the requirements of the First Amendment, 198 F.3d at 1086, 1094. In part, the majority explained:

> By criminalizing all visual depictions that "appear to be" or "convey the impression" of child pornography, even where no child is ever used or harmed in its production, Congress has outlawed the type of depictions explicitly protected by the Supreme Court's interpretation of the First Amendment. Because the 1996 Act attempts to criminalize disavowed impulses of the mind, manifested in il-

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[1] (...continued)
§ 2252A labeled "certain activities relating to material constituting or containing child pornography," [which] prohibits persons from mailing, transporting, receiving, distributing, reproducing, selling or possession child pornography (as redefined by the Act) within interstate or foreign commerce.

> licit creative acts, we determine that censorship through the enactment of criminal laws intended to control an evil idea cannot satisfy the constitutional requirements of the First Amendment.

198 F.3d at 1094. In addition, the *Free Speech* majority held that the CPPA was constitutionally infirm under the First Amendment because it was overbroad:

> The CPPA's inclusion of constitutionally protected activity as well as legitimately prohibited activity makes it overbroad (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 98 S.Ct. 2908 (1973)).

Id. at 1096. Further, the *Free Speech* majority held that the Acts criminalizing material that "appears to be a minor" and "convey[s] the impression" that a minor [is] engaged in explicit sexual activity is void-for-vagueness. *Id.* at 1095.

In *Ashcroft v. The Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389 (2002), the Court affirmed the Ninth Circuit majority, explaining, in part:

> The court [USCA 9] held the CPPA to be substantially overbroad because it bans materials that are neither obscene nor produced by the exploitation of real children as in *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). * * * The Court of Appeals voted to deny the petition for rehearing en banc, over the dissent of three judges. See 220 F.3d 1113 (2000). *While the Ninth Circuit found the CPPA invalid on its face*, four other Courts of Appeals have sustained it. * * *

122 S.Ct. at 1398 (ital. emph. added).

Thereafter, the Court reviewed the constitutionality of the CPPA in its entirety because the Act was a major departure from the established balance between the First

Amendment's free speech protections and the Government's interest in protecting children from the trauma of child pornography. In pertinent segments of its opinion, the Court refers to the Act in its entirety and defines the pivotal issue as follows:

> "We consider in this case whether the Child Pornography Prevention Act of 1996 (CPPA), 18 U.S.C. § 2251 *et seq.*, abridges the freedom of speech."

122 S.Ct. at 1396. The Court later explained, "The CPPA, for reasons we have explored, is inconsistent with *Miller* and finds no support in *Ferber*," 122 S.Ct. at 1402.[2]

Similarly, when discussing how the Act suppresses protected speech, the Court again refers to the entire Act when discussing the fundamental problems with its construction:

> The CPPA's penalties are indeed severe. A first offender may be imprisoned for 15 years. § 2252A(b)(a). A repeat offender faces a prison sentence of not less than 5 years and not more than 30 years in prison. *Ibid.* While even minor punishments can chill protected speech [citations

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[2] *Ferber* = *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348 (1982) and *Miller* [*v. California*], 413 U.S. 15, 93 S.Ct. 2607 (1973). Regarding *Ferber*, the Court explained that "*Ferber's* judgment about child pornography was based upon how it was made, not what it communicated and it reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protections of the First Amendment," 122 S.Ct. at 1402. In connection with *Miller*, the Court summarized the holding, explaining [that] "the Government must prove that the work, taken as a whole, appeals to the prurient interest, is patently offensive in light of community standards, and lack serious literary, artistic, political, or scientific value." *Id.* at 1399.

> omitted], this case provides a textbook example of why we permit facial challenges to statutes that burden expression.

122 S.Ct. at 1398.

The *Ashcroft* decision sustained First Amendment challenges to 18 U.S.C. §§ 2256(8)(b) and 2256(8)(d). *Id.* at 1405-06. Justice Thomas cautiously concurred suggesting that based on "technical advances" the government may have a compelling interest in barring or regulating "narrow" categories of "lawful speech" to effectively enforce pornography laws. *Id.* at 1406-07. Justice O'Connor's concurring/dissenting opinion, joined in part, by the Chief Justice and Justice Scalia, noted that CPPA's ban on "youthful-adult" pornography *appeared* to violate the First Amendment [but] the ban on virtual-child pornography does not. *Id.* at 1410 (discussing § 2256(8)(b)). The Chief Justice and Justice Scalia dissented urging that the Act be construed in a manner consistent with the First Amendment and therefore the statute should be sustained in its entirety. *Id.* at 1413-14.

Recall that the Court of Appeals' majority in *Free Speech* held that the Act was both overbroad and was unconstitutionally vague—explaining that:

> A statute is void for vagueness if it fails to define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary or discriminatory enforcement.

198 F.3d at 1095 (quotation marks and supporting citation omitted). Thus this Court's affirmation of the Ninth Circuit *Free Speech* majority necessarily connotes that the CPPA is both overbroad and suffers the vice of "void for vagueness." That said, the opinion of the Court of Appeals for the Seventh Circuit in the case below conflicts

with this Court's opinion in *Ashcroft* and the Ninth Circuit's majority opinion in *Free Speech*.

3. Circuit Conflict. The lack of circuit harmony becomes more pronounced when considering decisions such as *United States v. Fox*, 248 F.3d 394 (5th Cir. 2001) and *United States v. Snow*, No. 01-20129 (5th Cir. 2001) (unpublished). In both *Fox* and *Snow*, the defendants (as the petitioner here), were charged with offenses under 18 U.S.C. § 2252A(a)(5)(B). Post-*Ashcroft*, the Court granted cert., vacated and remanded (*Fox*, 122 S.Ct. 1602; *Snow*, 122 S.Ct. 1603). On remand, the Fifth Circuit returned *Fox* and *Snow* to the district court for further review, *Fox*, 293 F.3d 237 (5th Cir. 2002); *Snow*, unpublished Fifth Circuit order dated October 4, 2002 under No. 01-20129 remanded to district court. To be sure, the GVR orders do not amount to a final determination on the merits, but may indicate "a reasonable possibility that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration," *Lawrence v. Chater*, 516 U.S. 163, 167, 116 S.Ct. 604 (1996).[3]

In the ensemble, petitioner maintains that given the affirmation of the Ninth Circuit's *Free Speech* majority in *Ashcroft*, blended with the Fifth Circuit's GVR holdings in *Fox* and *Snow* (returning both cases to the district court), there is a clear conflict between those decisions and the holding below in petitioner's case.[4]

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[3] Justice Scalia (joined by Justice Thomas) filed a dissenting opinion, *sub nom.*, *Stutson v. United States*, 516 U.S. at 178, 116 S.Ct. 612 (1996), explaining the shortcomings in the Court's GVR practice. Petitioner pretermits any observations regarding the Court's GVR custom.

[4] Supreme Court Rule 10(a) provides that review by this Court may be granted where a "United States court of appeals has

(continued...)

In all events, it is pristine that the Court held that segments of § 2256A were constitutionally overbroad and violative of the First Amendment, 122 S.Ct. at 1405-06.[5]

4. CPPA-Facially Unconstitutional. Petitioner maintains that the CPPA is facially unconstitutional in that it prohibits a substantial amount of protected expression. For example, the Act includes the word "image" but fails to define "image." According to Funk & Wagnalls 1977 edition of the *Comprehensive International Dictionary of English Language*, pg. 630, image is defined as a noun—(1) a visible representation of something; a statue, picture, idol, etc., (2) *Optics* The picture or counterpart of an object produced by reflection or refraction, or the passage of rays through a small aperture. If such an image can be actually thrown on a surface as in a camera, it is a **real image**; but if it is visible only as in a mirror, it is a **virtual image**; * * *.

The importance of "image" cannot be overlooked. Petitioner was charged with knowingly possessed a computer hard-drive containing an "image" of child pornography. Pet. App. 15a, *infra*. Can it be gainsaid that the First Amendment prohibits "images" where there is no rational basis for determining that which constitutes an "image?" Recall that segments of Senate Report No. 358 included

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[4] (...continued)
entered a decision in conflict with the decision of another United States court of appeals on the same important matter."

[5] The Court specifically held that § 2256(8)(b) which includes any "visual depiction [that] . . . appears to be of a minor engaging in sexually explicit conduct," and § 2256(8)(d) which includes any "visual depiction [that] is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct."

observations by constitutional scholars advising Congress that the CPPA will be held unconstitutional and thus rendered useless in battling child pornography. *Id.* at 29. The CPPA is realistically a criminal enactment intended to control evil speech and ideas which fails to satisfy First Amendment requirements. Clearly it is a content-specific enactment on speech because it regulates expression predicated on the ideas conveyed to viewers and is presumed unconstitutional, *R.A.V.*, *supra*, 505 U.S. at 382. Further it must be subjected to the most exacting constitutional scrutiny, *Boos v. Barry*, 485 U.S. 312, 321, 108 S.Ct. 1157 (1988).

In connection with strict scrutiny-First Amendment, the Court's current docket includes *United States v. American Library Association, Inc.*, cert. granted, 123 S.Ct. 551 (2002). In *American Library,* the government is challenging a three-judge district court decision which held the Childrens Internet Protection Act, Pub.L. No. 106-554, facially invalid under the First Amendment, case below, 201 F.Supp.2d 401 (E.D. Pa. 2002).

The district court decision in *American Library* cited to *Ashcroft v. Free Speech Coalition*, explaining, *inter alia,* [that] "[T]he Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct," 201 F.Supp. at 473-74. The Court continued citing *Free Speech* noting that "The argument . . . that protected speech may be banned as a means to ban unprotected speech . . . turns the First Amendment upside down. The government may not suppress lawful speech as the means to suppress unlawful speech," 201 F.Supp. at 477.[6]

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[6] The *American Library* district court decision continued citing *Free Speech, vis-a-vis,* First Amendment rights to possess obscene materials. *Id.* at 478.

Because the Court's decision in *American Library* may impact on this petition, it is respectfully suggested, that disposition of this petition be held in abeyance pending the decision in *American Library*.

5. Guilty Plea Vacation-Plain Error. As earlier explained, petitioner was charged in count three of information 02-118 with knowingly possessed [on or about February 12, 2001] a computer hard drive containing an "image of child pornography" . . . in violation of 18 U.S.C. § 2252A(a)(5)(B).[7] The relevant definitional section sets out four different ways that "visual depictions" may qualify as "child pornography," (18 U.S.C. § 2256(8)(A)-(D)). But in *Free Speech Coalition* this Court specifically held that the segments of the definition of "child pornography" found in 18 U.S.C. § 2256A(8)(b) and (8)(d) were unconstitutionally overbroad and violative of the First Amendment, 122 S.Ct. at 1405-06.

The difficulty in petitioner's case is that count three of the information failed to specify which of the four definitions may have been involved in an undifferentiated reference to "child pornography." Pet. App. at 15a. Thus it is impossible to know whether count three was predicated on segments of "child pornography" specifically declared unconstitutional in *Free Speech Coalition*. Under such cir-

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[7] In accordance with Rule 7(b), Fed.R.Crim.Proc., petitioner waived indictment. However the term "indictment" includes an indictment or information in any court under which a crime is punishable by imprisonment for a term exceeding one year . . ., *United States v. Fillman*, 162 F.3d 1055, 1057 (10th Cir. 1998) (Fillman challenged his conviction pursuant to 18 U.S.C. § 842(i) based on the proposition that an antecedent criminal charge was by "information" not "indictment." The court rejected his statutory challenge finding there was no difference between [an] indictment or information for purposes of § 842(i)); Accord *United States v. Gevedon*, 214 F.3d 807, 813 (7th Cir. 2000) (same-collecting parallel circuit decisions).

cumstances petitioner did not receive clear notice of the charges and therefore a finding of plain error may ensue, see *Menna v. New York*, 423 U.S. 61, 62-63, n. 2, 96 S.Ct. 241 (1975) ("[A] plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute."); *United States v. Knowles*, 29 F.3d 947, 951 (5th Cir. 1995) (reversing, on plain error review, conviction obtained on guilty plea where statute of conviction had been declared unconstitutional during timeframe between sentencing and appeal).[8]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[8] Petitioner failed to challenge his guilty plea below based on a *Menna/Knowles* analysis and therefore [guilty plea vacation] relief can be granted only by way of plain error, cf., *United States v. Vonn*, 535 U.S. 55, 122 S.Ct. 1043 (2002). Petitioner concedes that in light of *United States v. Cotton*, 535 U.S. 625, 122 S.Ct. 1781 (2002), any [lack of district court] jurisdiction[al] argument falls by the wayside. However, unlike Cotton, petitioner asserts that plain error is evident because there is neither compelling nor overwhelming "child pornography" proof (and unlike *Cotton*, petitioner does not incorporate any purported *Apprendi v. New Jersey* (530 U.S. 466 (2000) issue as part of this petition). In all events, the Court may exercise its Rule 10(a) supervisory power by entering an order vacating petitioner's count three-guilty plea conviction and directing further lower court review.